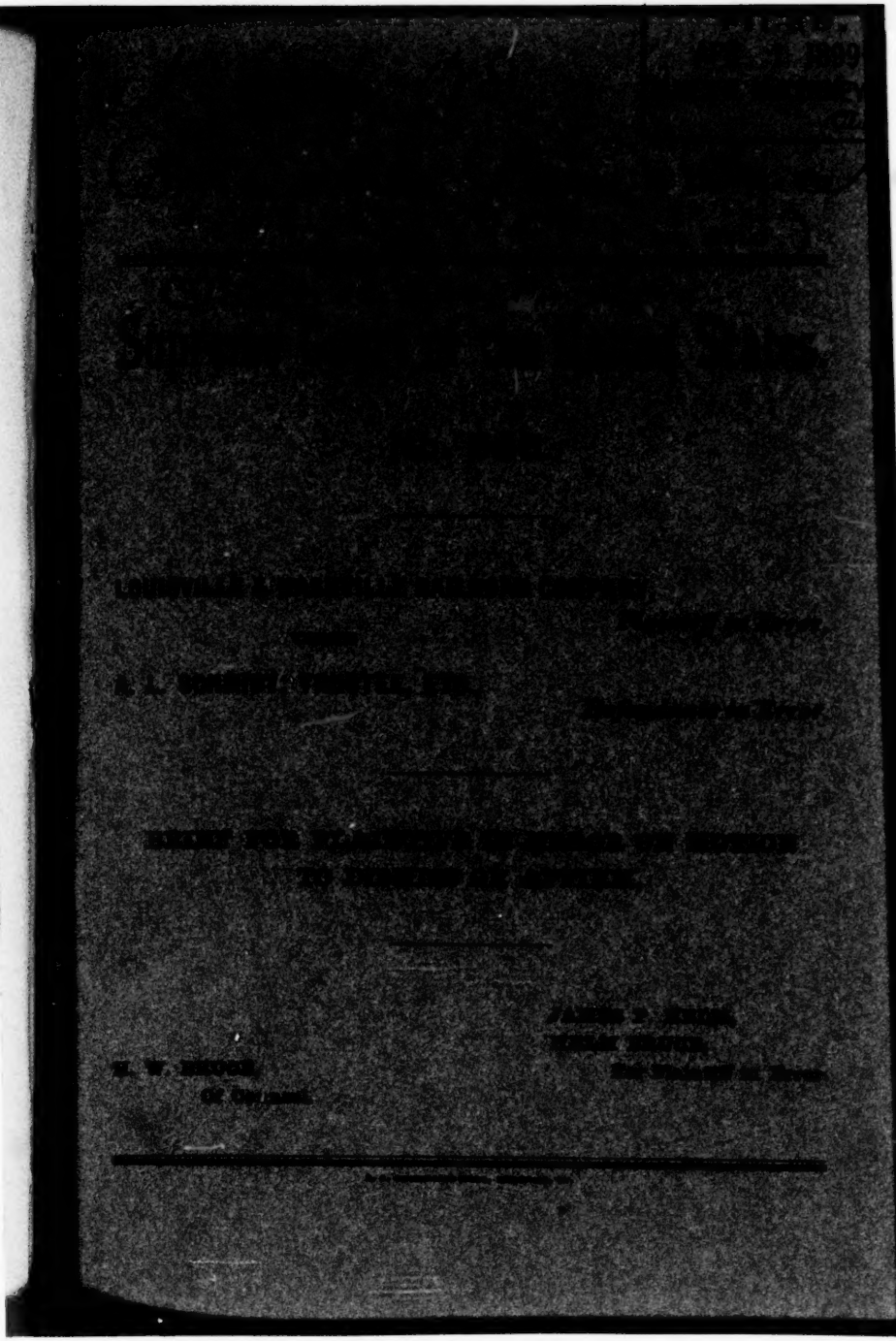

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Plaintiff in Error,*

vs.

A. L. SCHMIDT, TRUSTEE, ETC., . . *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

We have been served with notice of a motion to dismiss or affirm. In support of this motion we have been handed two briefs by separate counsel for defendants in error. These briefs together cover nearly seventy printed pages (exclusive of indexes and appendices), and are devoted mainly to a discussion of the merits of a question which, we are told in the notice, is "so frivolous as not to need further argument." One of these briefs is mainly devoted *nominally* to the question of jurisdiction, but the major part of it is really a discussion of the merits of the only question in the case, to-wit, "due process of law." The other is avowedly devoted almost entirely to a discussion of the merits. Every possible phase of the case is discussed with great elaboration, including extensive reviews of authorities on all questions involved, directly or indirectly. We can not believe that on

final submission the printed argument of counsel for defendants in error would be materially different from those submitted on this motion.

This seems to us to be a palpable perversion or abuse of the privilege accorded defendants in error, by Rule 6 of this Court.

We shall not attempt to follow all the details of the exhaustive argument in the briefs for defendant, nor attempt to respond *eo nomine* to each separate point. But we feel quite confident we can show the motion to dismiss or affirm should be overruled.

We feel that a word of explanation as to the condition of the record is proper. It contains a great deal of matter which we considered entirely irrelevant to the federal question presented to this Court; but defendants in error would not consent to the omission of anything which is now found in it. We did make an agreement (Rec. p. 317) by which a great mass of matter in the record in the State court was omitted; but we could secure the omission of no more. It was also our intention to have availed ourselves of the privilege of Rule 10, Sec. 9, of this Court, and to print only such parts of the record as we thought necessary for consideration. But we were anticipated by defendants in error, who have had the whole record printed on the present motion.

We have, however, for convenience, had an "Abstract of Record" printed, which we believe contains all that is material for the consideration and decision of the federal question.

STATEMENT.

A. L. Schmidt, as trustee for the bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, uniting with him certain of the individual bondholders, instituted a suit in the Louisville Law and Equity Court *against the Louisville, Cincinnati & Lexington Railway Company*, which was the *sole defendant*. Plaintiffs claimed that *this defendant*, in taking a lease on the Northern Division of the Cumberland & Ohio Railroad (hereafter called the "C. & O.") had agreed that it would mortgage, and that it did mortgage certain *net earnings* on its *own road*, as an additional security for these bondholders of the C. & O. They claimed that such net earnings had been received by defendant, though they said they could not state the exact amount thereof; and that they had demanded of defendant the payment of the accrued interest on their bonds, but the same had been refused. Wherefore they prayed that the case be referred to the Commissioner to ascertain and report the amount of these alleged net earnings, and that defendant be required to pay same into court, to be applied to payment of plaintiffs' coupons. (Rec., 2–13; abstract, 1–12.)

As stated above, the Louisville, Cincinnati & Lexington Railway Company, the person with whom the contract was made, was the *sole defendant*. And no other person was ever made a defendant, except that subsequently a certain bondholder was made defendant on the allegation that he refused to unite as plaintiff (Rec., 32), and thereafter the Northern Division of the Cumberland & Ohio was made a formal defendant, on the allegation that it "claims to have some interest in this action." (Rec., p. 35), but no relief was demanded against it and it never appeared.

The only person against whom summons was ever issued (omitting mention of the two formal defendants) was the

Louisville, Cincinnati & Lexington Railway Company, and the return was made as executed upon it. (Rec., 13–14.)

The only person that ever answered in the cause is the Louisville, Cincinnati & Lexington Railway Company. Its answer is exceedingly brief, and simply denies that it had received any net earnings of the character alleged. (Rec. 33, Abstract 12.) This completed the issues.

There was no attempt made to impound any earnings. No application made for a receiver, and no attachment taken out. Neither was any lien claimed on the corpus of the property of the defendant, out of which the earnings, if any, arose. It was nothing more nor less than a personal *suit for an accounting* between the two parties to a contract.

Over this matter a long fight was had, during the course of which a certain report styled "R. E. S. No. 2" was filed, showing net earnings to a certain date amounting to $60,-192.27, which was finally held to be correct; and, accordingly, plaintiffs moved for a confirmation of that report and "for a rule upon *defendant—Louisville, Cincinnati & Lexington Railway Company*—to pay into Court the sum of $60,192.27, the amount of net earnings shown by report of R. E. Sewell marked 'R. E. S. No. 2.'" And thereupon the Court entered a judgment, allowing defendant a certain credit against the amount stated above, leaving a balance of $53,565.62, which it ordered to be paid into Court by a certain day, and issued a rule against defendant to pay same, returnable on the day named. (Rec. 214, Abstract 15.) This was on *June 1, 1894.*

To this rule the defendant responded that it had no funds with which to comply with the order of the Court. (Rec. 215, Abstract 16.)

Plaintiffs first took issue on this response by a reply thereto, but subsequently offered to withdraw the reply, and on May 27, 1895 (*a year after the entry of the final judgment in the cause*) offered to file an "an amended and supplemental petition making the *Louisville & Nashville Railroad*

Company a party to this suit." (Rec. 222; Abstract 21.)

This "supplemental" petition here offered was an elaborate pleading alleging practically the same facts which had been alleged in the original petition against the Louisville, Cincinnati & Lexington Railway Company; but further alleging that *in 1881*, which was *before the institution of this suit*, the Louisville & Nashville Railroad Company had purchased the railroad of the Louisville, Cincinnati & Lexington Railway Company, and had received its earnings, and had conducted the defense of this suit against the Louisville, Cincinnati & Lexington Railway Company. And accordingly plaintiffs prayed that the Louisville & Nashville Railroad Company be made a defendant, and for judgment against it for the subjection of the earnings made on the railroad of the Louisville, Cincinnati & Lexington Railway Company. (Rec. 224–234). This supplemental petition is not copied into the Abstract of Record, because it was never allowed to be filed, and its statements were subsequently repeated in an affidavit, which was afterwards filed, and which is copied into the Abstract, p. 23.

The Court refused to allow this "supplemental" petition to be filed, or the Louisville & Nashville Railroad Company to be made a party defendant; proceeding upon the principle well settled in Kentucky, and everywhere else, that when a final judgment has been entered in a cause and the time has passed in which the court has control over its judgments, *the cause is at an end*, and it is too late then to open it up and bring in new parties, and grant relief against them. (Meadows vs. Goff, 90 Ky. 541; Brown vs. Vancleave, 86 Ky. 381.)

Plaintiffs then appealed to the Court of Appeals from the order refusing to allow this amended petition to be filed.

The Court of Appeals *affirmed* this judgment or order on April 4, 1896; and held that it was too late to bring a new party into the cause; but said in its opinion that if the facts stated in the amended petition were true the Louisville &

Nashville Railroad Company was "*already a party* defendant and bound by the judgment"; and that the proper thing to do would be either to institute a separate suit against the Louisville & Nashville Railroad Company, setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Company in this suit by the rule based upon an affidavit stating the facts set out in the amendment. (Abstract 56–63; 99 Ky. 143–155).

The Court's attention was immediately called to the fact that the only matter before it was as to the propriety of the order of the lower court in refusing to allow the amendment to be filed, and that the question of what subsequent proceedings plaintiffs should take was not before the Court. Thereupon the Court, in a modified opinion, conceded that "the opinion *went too far* in stating that questions were decided which were not strictly before the Court upon the appeal," and that what was said, as noted above, should be treated as having been said only *arguendo*. (Abstract 64; 99 Ky. 156.)

Upon the return of the cause to the lower court plaintiffs adopted the suggestion of the Court of Appeals; filed an *affidavit* practically repeating the statements of the amended petition (Rec. 262; Abstract 23) and moved for a rule against the Louisville & Nashville Railroad Company to pay into court the sum of $53,565.62, the amount fixed in the judgment against the Louisville, Cincinnati & Lexington Railway Company. (Rec. 261; abstract 22.)

The lower Court, however, treating the language of the opinion of the Court of Appeals, heretofore mentioned, as a suggestion and not an adjudication, declined to issue the rule; and in this connection delivered a written opinion giving its reasons for so doing, which we submit, for lucid exposition of fundamental legal principles and learned review of authority, would do honor to any court. (Rec. 272; Abstract 33.) It showed that the suit was solely against the Louisville,

Cincinnati & Lexington Railway Company, the original party to the contract with plaintiffs; that the Louisville & Nashville Railroad Company was not made a party defendant, though it had bought the railroad of the Louisville, Cincinnati & Lexington Railway Company, by duly recorded conveyance, *four years before this suit was instituted;* that no process had ever issued against it; nor had it ever entered its appearance; and that no judgment had ever been entered against it; and neither was it a *pendente lite* purchaser, for whatever it purchased of the Louisville, Cincinnati & Lexington Railway Company was years before the suit was brought, as shown by duly recorded conveyance; that if the Louisville & Nashville Railroad Company were in fact liable it might seem a hardship to have to institute an original suit against it; but that it was plaintiffs' own fault that he had never brought that party before the Court; that *the Court could not know what defenses it had;* but it was entitled to "its day in court." (Rec. 272; Abstract 33.)

Accordingly, as said above, the Court declined to issue any rule against the Louisville & Nashville Railroad Company, or to treat it in any manner as a party to that cause.

On appeal to the Court of Appeals it adhered to the views it had expressed in its opinion heretofore mentioned, and held that the lower court ought to have issued the rule as requested. (Abstract 65; 44 S. W., Rep. 130.)

On return of the cause to the lower court plaintiffs renewed their motion for a rule, and thereupon the Court issued a rule against the Louisville & Nashville Railroad Company to "show cause why it shall not be required to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell, No. 2, together with interest . . . which principal and interest now amounts to the sum of $90,181.87." (Rec. 292; Abstract 49.) Or, as subsequently expressed by the Court of Appeals, the Court "awarded a rule against the appellant company to show cause why it should

not be compelled to pay into court *the amount of the judgment rendered against the Louisville, Cincinnati & Lexington Railway Company.*" (Abstract 68; 47 S. W. Rep. 583.)

This was the first time in all the history of this litigation that any pretense of process had ever issued against the Louisville & Nashville Railroad Company; the first time it had ever been called upon to make answer or response to any one; and then the call was to *show cause why it should not pay a judgment for money which had been theretofore entered against some one else.*

Being thus called on for the first time in the litigation it filed a response, in which, among other things, it said:

First. "That it is not a party to this suit. *It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent, or that is applicable to this "respondent, and no judgment or order has ever been "entered in this case against this respondent, and no pro-"cess has ever issued against or ever been served on this "respondent.*"

Second. "*There has never been a time from the insti-"tution of this suit up to this time when this respondent "could, with propriety, have filed an answer setting up its "defenses against the alleged claim of the plaintiff, and to "require it now to pay into court upon this rule the amount "stated in the rule, or any other amount, WOULD BE TO "DEPRIVE THIS RESPONDENT OF ITS PROP-"ERTY WITHOUT DUE PROCESS OF LAW, "CONTRARY TO THE CONSTITUTION OF THE "UNITED STATES IN SUCH CASES MADE "AND PROVIDED.*

"If the plaintiff should be required, in the usual and "orderly way, to institute a suit against this respondent "to hold it liable for plaintiffs' alleged claim, this

"respondent has and could and would present good, valid "and subsisting defenses thereto."

Third. The third paragraph of the response simply showed that if the judgment be considered a judgment against the Louisville & Nashville Railroad Company in favor of the bondholders, it should not be required to pay the full amount into court, because it held some of the bonds itself.

Fourth. The fourth paragraph showed that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser; and outlined what had been the manifest understanding and conduct of the case up to the time the Court of Appeals threw out the suggestion heretofore mentioned. It showed that the suit was instituted against the Louisville, Cincinnati & Lexington Railway Company, because it was the party with whom plaintiffs had made their contract; though *plaintiffs knew, when they filed their suit, that the Louisville & Nashville Railroad Company was then the owner of the property which had been the railroad of the Louisville, Cincinnati & Lexington Railway Company;* though so far as concerned the assignment of the lease on the Northern Division of the Cumberland & Ohio Railroad, the latter had refused to consent to the assignment; and that plaintiffs instituted their suit against the Louisville, Cincinnati & Lexington Railway Company *on the contract*, believing that it could not avoid its liability by assigning the lease; it being the policy of plaintiffs first to get a judgment against the Louisville, Cincinnati & Lexington Railway Company, with whom they had the contract, and then, if they should fail to procure satisfaction of the judgment, sue the Louisville & Nashville Railroad Company and seek to hold it responsible. The response also showed that the *Louisville, Cincinnati & Lexington Railway Company was a distinct corporation and had continuously preserved its organization.*

Upon the filing of this response plaintiffs moved to make the rule absolute, and the Court did so, entering a judgment in which, after making certain recitals as to the submission and filing of the opinion, etc., it proceeded as follows:

"And it is ordered and adjudged that the said response to "the said rule is *insufficient*, and the said rule is made abso- "lute, and the said Louisville & Nashville Railroad Com- "pany is ordered to pay into Court the amount of judgment "herein, the said sum of $90,053.34, as of March 21, 1898, "subject, however, to the following credit, viz.: . . .

"After allowing the credit aforesaid, the balance due "upon said judgment is the sum of $77,784.45, and the said "Louisville & Nashville Railroad Company is adjudged and "ordered to pay the said sum into Court on the 7th day of "April, 1898.

"To the ruling of the Court in holding the response "insufficient, the Louisville & Nashville Railroad Com- "pany excepts." (Rec. 308.)

In entering this judgment the Circuit Court filed an opinion in which it again vigorously protested that this was *not due process of law*, but said it felt bound to adopt the views of the Court of Appeals, as expressed when it said the rule should issue. (Abstract 52; Rec. 309.)

The Louisville & Nashville Railroad Company then appealed to the Court of Appeals from this judgment, where it was affirmed.

In view of the argument for defendant in error that this entire cause was simply a proceeding *in rem*, it is very instructive to note the view taken by the Court of Appeals at the conclusion of the cause as to the nature of the judgment entered. The Court itself, in a former opinion, had spoken of the proceeding as one *in rem*, and when its attention was

called to this by appellant in resisting the application for damages on the supersedeas bond, the Court said:

"While this is true, yet the proceeding to compel the "payment of the fund into Court by the appellant company "is *essentially personal* against it, and a judgment, to be "enforced by rule, directing appellant to pay the amount "of the judgment into Court is, in our opinion, *essentially* "*a personal judgment, upon which the Court might have* "*ordered execution to issue.*" (Abstract 69; 47 S. W. Rep. 583.)

It will be remembered that the only kind of judgment ever entered in the cause *against any one* was a judgment ordering money to be paid into Court, and directing a rule to issue to compel its payment. And this was the character of judgment which the original petition prayed for. What, therefore, the Court meant by saying that the *proceeding*, seeking such a judgment, was *essentially in rem*, but that the judgment, when thus obtained, was *essentially in personam*, we confess our inability to explain. But the important fact to be remembered is that the Court of Appeals has held in this case that such a judgment as was entered in this cause is "essentially a *personal* judgment, upon which the Court might have *ordered execution to issue.*"

After the judgment of affirmance was entered, the writ of error from this Court was allowed. Then came the motion to dismiss for want of jurisdiction, or to affirm because the federal question is so frivolous as not to need further argument.

MOTION TO DISMISS.

The Revised Statutes of the United States (Sec. 709) provide:

"A final judgment or decree in any suit in the highest "court of a State in which a decision in the suit could be "had . . . where any title, right, privilege or im- "munity is claimed under the Constitution . . . of . . . "the United States, and the decision is against the title, "right, privilege or immunity specially set up or claimed "by either party under such Constitution . . . may "be re-examined and reversed or affirmed in the Supreme "Court upon a writ of error."

In Chicago, Burlington, &c. R. Co. vs. Chicago, 166 U. S., 226, an effort was being made to condemn a right of way for a street across the right of way of a defendant railroad company. There was a verdict and judgment of condemnation, fixing the damages to the railroad company at one dollar. On motion for a new trial it claimed that its property would by this judgment be taken without due process of law. The motion was overruled. The judgment was, on appeal, affirmed. A writ of error from this Court was allowed. A motion was made to dismiss, and this Court said:

"If the right now asserted under the Constitution of "the United States was specifically set up or claimed by "the defendant in the State Court, the motion to dismiss "must be overruled. (Rev. Stat., Sec. 709.)

"Now the right in question was distinctly asserted by "the defendant in its written motion to set aside the ver- "dict and grant a new trial. . . .

"When the trial Court overruled the motion for a new "trial and entered judgment, it necessarily held adversely "to these claims of Federal right. . . . The judg- "ment of affirmance necessarily denied the Federal rights "thus specially set up by the defendant, for that judgment "could not have been rendered without deciding adversely "to such claims of right. Those claims went to the very "foundation of the whole proceeding, so far as it related "to the railroad company, and the legal effect of the judg- "ment of the Supreme Court of the State was to deny "them. . . . There is, we conceive, no room to "doubt that the legal effect of the judgment below was to "declare that the rights asserted by the defendant under "the National Constitution were not infringed by the pro- "ceedings in the case, consequently the motion to dismiss "for want of jurisdiction must be overruled."

In the case at bar the very first time that any semblance of process was issued against the present plaintiff in error, the very first time it was called on to speak, and before any order was ever made against it, except the order for the issuance of a show-cause rule, it responded and especially set up and claimed a right under the Federal Constitution in unmistakable terms as follows, viz.:

"The Louisville & Nashville Railroad Company, for "response to the rule against it herein . . . says:

First. "That it is not a party to this suit. It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent or that is applicable to this re- "spondent, and no judgment or order has ever been en- "tered in this case against this respondent, and no pro- "cess has ever issued against or ever been served on this "respondent.

Second. "There has never been a time from the insti-
"tution of this suit up to this time when this respondent
"could, with propriety, have filed an answer setting up its
"defenses against the alleged claim of the plaintiff, and *to*
"*require it now to pay into court upon this rule the amount*
"*stated in the rule, or any other amount, would be to de-*
"*prive this respondent of its property without due process of*
"*law, contrary to the Constitution of the United States in*
"*such cases made and provided.*"

This specially set up and claimed a right under the Federal Constitution as plainly as could possibly have been done, and when the Circuit Court adjudged this response "insufficient," and made the rule absolute, and ordered the respondent to pay into court the amount named in the rule, this was a denial of the Federal right claimed in the response.

There was no assignment of errors in the Court of Appeals, because there is no such thing known to the law of the State. An appeal takes up the whole case and all rulings made by the trial court. And when the Court of Appeals affirmed the judgment of the Circuit Court, holding the response insufficient, making the rule absolute, and ordering the respondent to pay into court the amount named in the rule, it necessarily denied the Federal right claimed in the response. And, as said by this Court in the case cited, that claim of right "went to the very foundation of the whole proceeding," and the judgment of affirmance "could not have been rendered without deciding adversely to such claims of right." There was no other ground on which the decision was or could have been rested. If that claim of right had been sustained it would necessarily have resulted in a reversal of the judgment with directions to discharge the rule.

To adopt again the language of the opinion cited:

"There is, we conceive, no room to doubt that the legal
"effect of the judgment below was *to declare that the rights*

"*asserted by the defendant under the National Constitution* "*were not infringed by the proceedings in the case.* Conse- "quently the motion to dismiss for want of jurisdiction "must be over-ruled"

As to whether or not the property of plaintiff in error is, by this judgment, taken "without due process of law," as to whether the judgment shall be affirmed or reversed, is a question to be hereafter determined. But as to the jurisdiction—"the power to hear and determine" this question so distinctly made in the State Court by plaintiff in error, and so clearly decided against it—we can perceive absolutely "no room to doubt."

Council for defendant in error, under the name of "jurisdiction," discuss elaborately the merits of the only question this Court can consider, if it has jurisdiction, viz.: was plaintiff in error deprived of its property without due process of law? Under the title, "jurisdiction," they insist that plaintiff in error *did have a hearing*, and therefore its property *was not taken without due process of law.* But that is the very question which we ask this Court to "hear and determine"; to do which is to exercise "jurisdiction."

They say the decision of the State Court was based upon a "question of procedure." But we say that "procedure" was not "due process of law." When a subject of the Sultan of Turkey is sewn up in a bag and quietly dropped into the Bosphorus, under cover of night, without a chance to ask, "Why?" this may be said to be a "matter of procedure"; but it is not such procedure as in Anglo-Saxon countries would pass for "due process of law." When George Jeffreys presided at the "Bloody Assize," he was the Chief Justice of England, and hundreds of men lost life, liberty or property by process of law; but Englishmen have never believed that the judicial tragedies of that dark day were accomplished by, *due* process of law. In Murray's lessee vs. Hoboken Land,

&c., Co., 18 Howard, 272–276, this Court said: "That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' . . . It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will." In the much later case of Davidson vs. New Orleans, 96 United States, 97–102, in speaking again of process which had been provided by legislative act, this Court said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application, where the invasion of private rights is affected under the forms of State legislation." And in the very recent case heretofore cited of Chicago, Burlington, &c., R. R. Co. vs. Chicago, 166 United States, 226–235, this Court, after quoting the language which we have just quoted from Davidson vs. New Orleans, said: "*The same question could be propounded, and the same answer should be made in reference to* JUDICIAL PROCEEDINGS *inconsistent with the requirement of due process of law.*" Manifestly it is no bar to a consideration of the question which we have submitted to this Court, to say that it is merely a "question of procedure." There lies a deeper question, and it is this: Was that procedure or process "*due* process of law?"

But counsel say the Federal question was not "*seasonably* raised." They say "the opinion of the Court of Appeals *announcing the doctrine*" of which we complain was delivered in 1896, and there was no claim of Federal right till March 21, 1898. Counsel well speak of this as a "doctrine"; it certainly was not a judgment, as the Court itself conceded. But it was not that enunciation of a "*doctrine*"

that deprived plaintiff in error of its property; it was the subsequent entry of a *judgment* in the Circuit Court, and its subsequent affirmance in the Court of Appeals. And, as we have seen, before any such judgment was entered, and the very first time plaintiff in error was called on to speak, it specially set up and claimed this Federal right.

We shall not attempt to follow defendant's counsel in their citation of authorities on this jurisdictional question. In some the question was not properly raised. In others the decision rested on other grounds than the one involving the Federal question, and would have been just the same if the Federal question had been decided for the party complaining. To review these authorities would require an explanation as to each of them, and we can not believe this is necessary, in view of the plain letter of the statute, and the equally plain enforcement thereof in Chicago, Burlington, &c., R. Co. vs. Chicago, 166 U. S. One striking feature of the briefs for defendant in error, which show great industry and research for authority, is that neither one of them makes any reference whatever to the case just mentioned, which is so recent, so strong, and so strikingly in point.

We submit that there is not only no ground, but not even "color," for the motion to dismiss; and that a defendant in error has no right to make such a motion, simply for the purpose of cutting off argument by uniting therewith a motion to affirm; and the latter motion should, for that reason alone, be overruled. We, however, are of course compelled to discuss it, as if it were properly made, and to discuss it at some length, for the whole case of plaintiff in error is put at stake by this motion; though defendant in error risks nothing.

MOTION TO AFFIRM.

1. Counsel say "the question which plaintiff in error attempts to raise has long been so conclusively settled against its contention that it is no longer open for argument"; and again, that it is "so frivolous as not to need further argument." And yet, as heretofore noted, they submit on this subject, briefs covering nearly *seventy printed pages* (exclusive of indexes and appendices) *devoted mainly to the merits* of this "frivolous" question—for much that purports to be a discussion of jurisdiction is in reality a discussion of the merits; and what is more striking still is, that upon this question, which they say "has been so long settled that it is no longer open for argument," they, with all their diligence and research, have not produced one single authority, whether text-book or judicial decision, to show that in all the history of English or American jurisprudence a simple *judgment for money against one person, the sole defendant in the cause*, was ever enforced as if it were *a judgment for money* against *an entirely different person* not named in it, nor even shown by the record to be a party to the cause in which it was entered. *Yet that is what was done in this case.*

Let us examine the authorities relied on. We have read with care every case cited by the Court of Appeals or by counsel for defendants in error; in addition to which we have conducted an independent research; and we believe it can be truly said that the case at bar, so far as relates to the proceedings against the Louisville & Nashville Railroad Company, is *absolutely unique in jurisprudence.*

Many cases can be found where a judgment has been held to be binding *as conclusive evidence on certain points* against one who was not a party to the record of the cause wherein it was entered; and again judgments involving the disposition of specific property have been enforced by rule

against *pendente lite* purchasers. But those cases are far different from this one.

Thus Lovejoy vs. Murray, 3 Wall., 18, is extensively quoted in the brief of counsel, and is as strong and as pertinent as any case they cite. And no case could better illustrate what is the really true principle involved in these cases, and the false application of it in the case at bar. There property had been taken by a sheriff under an attachment. A stranger claimed it. Plaintiff gave the sheriff an indemnifying bond; whereupon the sheriff sold the property. The stranger sued the sheriff in tresspass; the sheriff gave his indemnitor notice; the latter employed counsel and took charge of the defense. Plaintiff recovered a judgment for damages against the sheriff; of which, however, he only received partial satisfaction. He desired then to proceed against this indemnitor. But how did he proceed? He could not in that case have proceeded by execution or rule, because the indemnitor was a non-resident. He had to go to his State to reach his property. But how did he proceed there? He did not treat the indemnitor as a party defendant to the judgment, and simply sue *on the judgment;* but he sued him *in trespass*, exactly as he had done the sheriff. This Court held that in this action of trespass the plaintiff had three points to establish, viz.: (1) his title to the goods taken, (2) their value, and (3) the participation of the defendant in the conversion or trespass. And the Court further held that the first and second points were proved by the record of the action against the sheriff, and the last point was proved by the production of the indemnifying bond. This was very far from treating the judgment as a money judgment against the indemnitor. It left the latter *free to set up any defense he might have* against this claim of personal liability, and simply made the judgment conclusive on the two points mentioned.

Elliott vs. Hayden, 104 Mass., 180, from which counsel also quote, is very much like the case just cited, except it is a State Court case, and all the proceedings occurred in the same State. Plaintiff, a claimant of property, recovered judgment against an attaching officer in an action for *conversion*. An indemnifying bond had been given the officer. Plaintiff desired to pursue the indemnitor. If such a doctrine as is now advocated had then ever been heard of in Massachusetts, plaintiff would have filed an affidavit and asked for an order directing either an execution or a rule to pay against the indemnitor. But he did neither. He sued him *in conversion*, as he had done the officer, and offered his judgment in evidence on certain points.

Cases like these have long been familiar to the profession. Is it not then most remarkable that never before the present case was such process as was pursued here ever adopted in any court of justice?

Strong reliance is also placed on Eagle Mfg. Co. vs. Bradley Mfg. Co., 50 Fed. Rep. 193; from which an extensive quotation is made in the brief. Plaintiff first sued David Bradley & Co., who were selling certain patented articles, for an infringement of its patent. It asked an injunction and an accounting, and got both; the main question being the *validity of plaintiff's patent.* (35 Fed. Rep. 295). It then sued the Bradley Mfg. Co., a manufacturing concern of which the defendants in the former suit constituted a branch, and sought to enjoin it from manufacturing these articles. It showed that in the first suit the defendant in the second suit had practically conducted the defense, and that the main point decided was the validity of plaintiff's patent. The Court, therefore, simply held in the second suit that this *question of validity* could not be relitigated. In the first case there seems to have been a decree for an accounting, but there was no attempt to collect this out of the defendant in the second case.

Bennett vs. Star Mining Co., 119 Ill., 9, involved simply the question of the validity of a mechanic's lien on real estate. There was no question of personal liability in the case. After the mechanic had brought suit to enforce his lien, and after process had been served on one of the parties in interest, but not on another, a third party bought the property. He came into the litigation, employed counsel and contested the validity of the lien under the names of the parties to the record. In subsequent litigation involving simply the question of the validity of this mechanic's lien, the Court held that this party was bound by the former adjudication *on that question.*

Daskam vs. Ullman, 74 Wis., 474, was a case where an assignee of a note sued the maker. The maker answered that the note had been paid to the assignor before the assignment. The assignor was notified of this defense, and assisted the plaintiff in endeavoring to disprove the plea of payment. Judgment, however, went for the defendant on this issue, and when the assignee subsequently sued the assignor to recover the amount of the note, the Court held that the former adjudication *on the question of payment* was conclusive.

In Palmer vs. Hays, 112 Ind., 289, a party sued under a statute of Indiana to have satisfaction entered of a judgment that had formerly been entered against him, which he claimed had been satisfied. It was shown on the trial that this judgment had once been replevied, and that the replevin bail had brought a suit exactly similar to the present one to have satisfaction entered of that judgment, and that the plaintiff in the present case had really taken charge of that litigation on behalf of the bail, but had been defeated therein on the question of satisfaction. Accordingly, the Court held in the second case that the former adjudication was conclusive *on this question.*

Coats vs. Roberts, 4 Rawle, 112, was a case where a party had been garnisheed to pay money. He denied that he owed

the money to the debtor in the action, but insisted that the debtor had previously assigned the claim on him to a third party, of which he had been notified. And this third party took part in that trial and endeavored to show that he was the owner of the claim, and not the debtor in the action. The Court, however, decided against this contention, and compelled the garnishee to pay the money to the plaintiff in that attachment proceeding. Subsequently this third party, who had claimed to be the assignee of this debt, sued this garnishee to recover the debt, but the Court held that the judgment against the garnishee, under the circumstances heretofore explained, was conclusive evidence in his favor on the question of ownership of the claim, and that he could not be compelled to pay the money twice.

In Van Knoughnet vs. Denny, 68 Hun., 179, a party sued for money loaned and services rendered. His wife took an active part in the prosecution of the suit, and actually furnished the itemized account called for by the defendant, and testified in the case, etc., etc. The plaintiff established his claim as sued for, but defendant established a counter-claim for a larger amount, which was allowed, and judgment was given over for the balance. Subsequently the wife sued this same defendant for certain items of the account included in the previous suit, claiming that they were really due to her and not to the husband. Of course, the Court held that it would be a fraud to permit her to maintain such a claim, after having assisted her husband in establishing the claim on those same items against this defendant, and after he had actually received satisfaction thereof by the allowance of a credit on the defendant's counter-claim.

Stoddard vs. Thompson, 31 Ia., 80, was a case where Thompson sued on a note. Defendant pleaded that Thompson was not the owner of the note, but that one Stoddard was the owner. Stoddard had notice of the suit, and took part in the defense, and tried to establish his ownership. Judgment,

however, went in favor of Thompson. Stoddard then sued to enjoin Thompson from collecting this judgment, on the ground that Stoddard and not Thompson was the real owner of the note. The Court simply held that the record in the former case was conclusive evidence in the second case on the question of the *title to the note.*

Louisville & Nashville Railroad Company vs. Hall, 12 Bush, 131, and Heckman vs. Louisville & Nashville Railroad Company, 85 Ky., 638, cited by the Court of Appeals in its opinion, were simply cases of *misnomer*, where the defendant intended to be sued was simply sued by the wrong name, and where every allegation made in the petition could have been truly made against the real defendant under its proper name. But of course, the case at bar is a wholly different case from that. Plaintiffs alleged in their petition that the Louisville, Cincinnati & Lexington Railway Company made the several contracts sued on, *which was true;* and they manifestly intended to sue this company which was the maker of these contracts. They did not mean to sue the *subsequent purchaser* of the property to which the contracts related. Nor did they connect the purchaser in any way with the transactions, nor make a single averment against it, but *all* of the averments were exclusively and appropriately against the contracting defendant. Hence, there was manifestly no case of misnomer.

Estell vs. Peacock, 44 Mich., 471, (also cited by the Court of Appeals) was where a party sued on a note given for logs. Defendant pleaded failure of consideration because the title to the logs was not in the plaintiff, but in a third party; and the third party undertook to establish this defense and to prove title in himself. The Court simply held that if this should be done and judgment should be given on this issue, it would be conclusive on the question of the *title to the logs* in any subsequent litigation between the plaintiff in that suit and this outside party.

Marsh vs. Smith, 73 Ia., 295, Linton vs. Harris, 78 Ga., 265, Lyon vs. Stanford, 42 N. J. Eq., 411, (15 Stewart), Landis vs. Hamilton, 77 Mo., 555, and Valentine vs. Mahoney, 37 Cal., 389, each involved simply a question of *title to land.* In each of them where the question of title to a particular piece of land was presented for decision, the Court simply held that some adjudication in a former suit wherein that identical question was decided, and in which the parties to the second suit had been heard on that question, was conclusive on that one point of the *title to the land.*

We have thus at some length examined every case referred to by either Court or counsel in the action at bar to show that the question involved in the present case is "frivolous" and is "conclusively settled," except a few cases cited merely by their titles, with the statement that they are "cumulative on the same point"; and we now repeat the statement that no case has been found, or can be found, where a *judgment for money against one person* has been treated as a *judgment for money against an entirely different person.* But, on the contrary, while in some of the very cases cited by counsel for defendant (such as Lovejoy vs. Murray, 3 Wall., and Elliott vs. Hayden, 104 Mass.), such process as that now contended for might have been, and doubtless would have been, used and applied, if it were known to the law, yet this was not done, but an independent suit was brought, in which full *opportunity* was allowed for *any character of defense that might be offered*, whether by way of traverse or confession and avoidance, whether by plea of limitation or accord and satisfaction, or estoppel of any kind, or any character of defense known to the law, and in which cases the former adjudication between different parties was simply used as *conclusive evidence on certain points therein adjudicated.*

2. We have been able to find but one case in which the theory or "doctrine" now attempted to be enforced was ever before suggested; and in that case it was promptly held to

be wholly without precedent and unauthorized. We refer to the case of Bidwell vs. Toledo Consolidated Street Railway Company, 72 Fed. Rep., 10. In this case suit had been brought by plaintiff against the Toledo Consolidated Street Railway Company for an alleged infringement of a patent. After the cause had progressed to a considerable extent, including the making up of the issues and the taking of proof, the complainant made an application for leave to amend its bill and make the General Electric Company, which was a non-resident, a party defendant to the cause. The grounds upon which this application was based and the reason for refusing it are so clearly stated in the opinion of Judge Ricks, and seem to be so directly applicable in principle to the case at bar, that we shall quote quite freely from the opinion. The Court said:

"The complainants have made application to this Court "for leave to amend their bill by making the General "Electric Company, a non-resident corporation, a party "defendant to this suit. It is not claimed that said pro- "posed defendant is within the jurisdiction of the Court, "and amenable to its process, or that it can be brought in "by original subpœna. It is sought to hold it *as a defend-* "*ant in this case* because it is alleged the counsel who are "preparing and conducting the defense for the Toledo "Consolidated Street Railway Company are the general "counsel for said proposed defendant. It is further con- "tended that because said counsel have so assumed the "defense of this case; have furnished witnesses in the em- "ploy of the General Elecrtic Company to testify on "behalf of the defendant; that such witnesses, while so "testifying, have been under salary from the General Elec- "tric Company; and that the latter has in fact agreed to "protect the said The Toledo Consolidated Street Railway "Company in the use of the appliances which it is claimed

"are an infringement of complainants' patent, and that it "will conduct any defense which the said Railway Com- "pany may be called upon to make in Court by reason of "the use of such appliances—*that by such conduct it has, "in legal effect, entered its appearance in the suit.*

"The Court passed upon an application of a somewhat "similar character made in this case some time ago. From "a statement of the facts as above stated, it will be observed "that the Court is now asked to declare that the General "Electric Company, by assuming the defense of this suit, "as alleged, on behalf of the Toledo Consolidated Street "Railway Company has in fact entered its general appear- "ance, and *made itself a defendant in this case*, and is to be "bound by the decree, if one should be made in favor of "the complainants and against the defendant. It is not "claimed that there was any intention on the part of the "General Electric Company to become a party to this case, "or that there is any such desire on its part. It is sought "to make the decree in this case binding upon that cor- "poration because of the acts before stated.

"Is it possible for a Court to make any orders in this "case, under these facts, which would make said corpora- "tion a party defendant in this suit against its wish? "Counsel insist that the Court has authority to make such "an order, and it should be made to promote justice. It is "urgently contended that the plaintiff is now in fact "prosecuting this case against both the Toledo Consolidated "Street Railway Company and the General Electric Com- "pany; that the latter is giving to its vendee and the user "of its electrical appliances the benefit of its great corpor- "ate wealth and influence, and the benefit of the experience "and ability of its counsel; and that if as the result in "such a contest the complainants should prevail, they "should have the benefit of their victory by securing a "decree which would be binding and conclusive upon the

"General Electric Company in any subsequent litigation "that may occur between the parties."

The Court then proceeds to refer to a case which had been cited as authority for such a proceeding, and which case had in terms cited Lovejoy vs. Murray, 3 Wall., 1, and Robbins vs. City of Chicago, 4 Wall., 657, and then said:

"These are the cases relied upon by Judge Shiras to "support his decree in the case cited by complainants' "counsel. They could not have been cited as authority to "support the construction which counsel in this case now "seek to put upon the decision made by Judge Shiras in "the case to which reference has been made. As before "stated, Mast & Co. were not made parties to the suit before "Judge Shiras, and the decree did not undertake to *bind* "*them as a party defendant*, but simply undertook to show "such a state of facts as would tend to estop them in sub-"sequent litigation from again controverting *the issues* "*made in the suit of which they had notice* and in which "they were interested, and in which they participated in "the manner stated.

"It may be that on the final hearing of this case, the "evidence may disclose such conduct on the part of the "General Electric Company—such a participation in the "actual defense of this suit—as will justify the Court in "making a statement of such facts on the face of the "decree, to the end that, in subsequent litigation involving "the same issues or the same interests, the complainants "may have a right to contend that the General Electric "Company is estopped from further defending against the "same. That is as far as the Court went in the case cited "in 41 Federal, 351. . . .

"I am, therefore, of the opinion that as the General "Electric Company is a non-resident corporation, and can

"not be brought into this court by original subpoena, leave "can not be given to amend the bill to make it a party "against its will by reason of the facts hereinbefore "stated. . . .

"The question of whether it has so identified itself "with this case as that it may be hereafter estopped in "subsequent litigation from again defending as to the "issues or interests now involved is a question, as I have "before said, which can only be passed upon at the final "hearing and in the final decree. This is certainly as far "as the Court under any circumstances would have author- "ity to act. I can find no authority for the proposition "that by such action as the General Electric Company has "taken with reference to this case, as hereinbefore stated, "it has made itself (being a non-resident corporation), "against its own intention and wish, *a party defendant in* "*this case*, and thereby conferred upon the Court authority "to make a decree binding and conclusive upon it *as a* "*party defendant*. It may have put itself in a position to "estop it in subsequent litigation as heretofore stated. It "will be proper to determine that question when it arises."

It is true that in the case just cited the General Electric Company was a non-resident, but that was not a material fact, if the principle contended for be true, because a non-resident may voluntarily enter its appearance and *make itself a party* to a cause (if such a thing were in any event possible), just as easily as can a resident. Judge Ricks clearly states exactly what we understand to be the law, viz.: that a person may, by taking part in litigation to which he is not a party, estop himself, under certain circumstances, from denying the matters *adjudged therein;* but he does not thereby make himself a party to the cause, or authorize the Court to make a judgment therein against him personally as a party defendant. The two things are widely different in legal effect. If

suit be brought against such a party, and he makes defense on points which were involved and decided in the former litigation, that former adjudication may be conclusive upon him *on those points;* but he *may have other defenses*, based upon matters personal to him, which were not and could not have been litigated in the former suit, and he, at least, has a *right to be heard* as to whether he has or not. But if he is held as a party defendant to the former judgment, *all defenses are cut off.*

A very clear illustration of this may be supposed in the case of a surety upon a note. Suppose the payee, believing the maker abundantly solvent, and not caring to bother with the surety, sues *the maker alone.* The surety, however, hears of the suit, and may know that as a matter of fact the maker is insolvent, and that at some time an attempt will probably be made to collect the debt off of him (the surety). He, therefore, takes naturally a very lively interest in the suit. The defendant (principal) may plead *non est factum*, or no consideration, or a vicious consideration. The surety knows that if any of these defenses shall prevail it will certainly release him. He, therefore, seeks to establish them, may possibly testify in support of them, and practically takes charge of the defense. But judgment goes for plaintiff against the principal. Execution is returned "no property found." He then sues the surety. The surety pleads (1) *non est factum* as to the principal; (2) *non est factum* as to himself; (3) vicious consideration; (4) some matter of estoppel between himself and the payee; (5) limitation. Now, upon the *first* and *third* points, possibly the former adjudication might bind the surety, but surely he would not be thereby precluded from making his *second*, *fourth* and *fifth* points. Yet, if that judgment is treated as a judgment against him personally, *all his defenses* are thereby cut off. The foregoing is merely a simple *illustration of the difference* between holding a judgment to be conclusive *evidence of certain facts*

against a party, and holding it to be a judgment against him as *a defendant in the judgment.*

Neither can it ever be assumed that the person could not possibly have any other defense against his personal liability than such as was made in the action already tried. *He has a right to be heard on this question.* It can not be presumed that he has *no defense;* nor can it be *prescribed what his defenses may be;* though it may be known that as to *certain defenses* he is *concluded.*

The case of Rees vs. Watertown, 19 Wall., 107, is very suggestive and instructive in this immediate connection. Rees was the holder of bonds issued by the City of Watertown. He brought suit against the city and obtained judgment and a return of "no property found." He then brought suit for mandamus to compel the levy of a tax to pay the judgment. He had three writs of mandamus issued; but each of them was evaded by resignation of the officials of the town. The matter was necessarily one of great publicity. Every one knew of it. Rees then brought suit in equity against the city showing these facts, and insisting that the corporate authorities were trustees for creditors; that the property of the citizens was a trust fund to pay the debts of the city; and asking that the Court enter a decree subjecting *the individual property of the citizens;* that it direct the marshal to report the property to the Court "*where any objections should be heard;*" that the amount of the debt be apportioned among the several owners of property; and that the marshall be then directed to collect these several amounts, or in default of payment sell the property. The Court refused the relief sought, and said that to grant it would be *to take property without due process of law.* In the course of its opinion it said:

"A court of equity can not, by avowing that there is a "right, but no remedy known to the law, *create a remedy*

"*in violation of law*, or even *without the authority of law.* "*It acts upon established principles not only, but through* "*established channels.* Thus assume that the plaintiff is "entitled to the payment of his judgment, and that the "defendant neglects its duty in refusing to raise the "amount by taxation, it does not follow that this Court "may order the amount to be made from the private estate "of one of its citizens. This summary proceeding would "involve a violation of the rights of the latter. He has "never been heard in court. He has had no opportunity "to establish a defense to the debt itself, or if the judg- "ment is valid, to show that his property is not liable to "its payment. . . . The proceeding supposed would "violate that fundamental principle contained in Chapter "29 of Magna Charta, and embodied in the Constitution of "the United States, that no man shall be deprived of his "property without due process of law—that is, he must be "served with notice of the proceeding and have a day in "court to make his defense.

"Due process of law undoubtedly means in the due "course of legal proceedings, according to those rules and "forms which have been established for the protection of "private rights. . . . *Whether in fact the individual* "*has a defense to the debt, or by way of exemption, or is* "*without defense, is not important. To assume that he has* "*none, and, therefore, that he is entitled to no day in court,* "*is to assume against him the very point he may wish to* "*contest.*" (pp. 122, 123.)

3. Now let us consider the facts of the case at bar and apply some of the principles we have been considering.

As we have already noted there was no claim of a lien upon any tangible property in the case at bar, and no attempt by either an attachment or by a receiver to get possession or control of any specific fund. The prayer in the petition that

defendant be required to pay into Court the earnings, upon which a lien was claimed, was simply a prayer for *final decree to that effect*, not an attempt to have the receipts from the property paid into Court from month to month during the litigation, and no attempt was ever made to have such a thing done. Pending the litigation the possession of the property was left undisturbed, with the right in the possessor to collect and use the earnings thereof. Plaintiffs simply trusted to the *personal ability of the defendant* to respond at the end of the litigation to any judgment that might be entered ordering it to *pay money*.

And when the judgment was entered it was simply an order to pay money into Court. It recited that the Commissioner's report showed $60,192.27 of earnings, but that defendant was entitled to a credit of $6,626.05, and therefore ordered that "the balance of $53,562.62" be paid into Court. It is true of course, that this was the amount of "earnings" which the Court held that defendant, the Louisville, Cincinnati & Lexington Railway Company, had received; and its liability to pay this amount into Court grew out of this fact; yet the thing ordered to be paid into Court was simply *money*, the amount of a balance of an account beginning back in 1882, twelve years before this order was made and three years before even the suit was begun; and in fact the account made by this report *closed in 1890*, four years before this order was made. The money which had from time to time during all these years from 1882 to 1890 been received from the operation of the road, or from carrying any specific freight or passengers, had no earmarks; and if any part of it was on hand in 1890 when the account in the report closed, even that was, of course, not on hand in 1894, when the order to pay was entered.

In other words, it was simply a *judgment for money*, operating purely *in personam*—in Kentucky all "final orders," whether in equity or at law, are by statute designated "judg-

ments;" there are no "decrees" *eo nomine*---and its enforcement was attempted in what was originally the sole means of enforcing such decrees in equity, viz., by rule or other process of contempt.

In Daniell's Chancery Pleading and Practice (5th Ed., Vol. 2, Ch. 26, Sec. VI, side page 1032), the author says:

"'Formerly a decree in a court of equity, unless it was "'for land, operated only *in personam;* and the only "'method of enforcing it was by what is termed process of "'contempt, against the party disobeying it.'"

And again (Sec. VII, side page 1042):

"'All decrees and orders may, as we have seen, be en-"'forced by process of contempt. Such as direct pay-"'ment of a sum of money or costs may *also* be enforced, "'under the Act considered in the last section, by writs of "'*fieri facias* and *elegit.*'"

In Kentucky it is provided by statute that:

"A final order or judgment for money, lands or other "specific things, may be enforced by any appropriate "writ of execution *allowable on a judgment at law*, ac-"cording to the nature of the case.

"Such writs shall issue and be returnable as other "writs of execution.

"*Nothing in this article shall prevent any party from "proceeding to carry an order or judgment of Court into "execution according to the ancient practice of Courts of "Chancery.*" (Ky. Statutes, Sec. 1663.)

Accordingly, after the judgment was entered for the payment of this money, the Court proceeded, as it had the right

to do, to endeavor to enforce it by a rule to pay. And it might, if it had seen fit, have ordered an execution of *fieri facias* (which only issues on judgments *in personam*) to issue upon it. If it could possibly need any authority to establish such a proposition, the last opinion delivered by the Court of Appeals in the case at bar furnishes it, for the Court there says: "The proceeding to compel the payment of the fund into Court by the appellant company is essentially personal against it, and a judgment, to be enforced by rule, directing appellant to pay the amount of the judgment into Court, is, in our opinion, *essentially a personal judgment*, upon which the Court might have ordered execution to issue." It is true the Court is here speaking of the order directing the Louisville & Nashville Railroad Company to pay the money into Court; but surely, if an order directing the Louisville & Nashville Railroad Company to pay the money into Court was "essentially a personal judgment," then the order directing the Louisville, Cincinnati & Lexington Railway Company to pay the same into Court was likewise "essentially a personal judgment."

The case then comes to this, as we have said before, a judgment which is "essentially a personal judgment" against the Louisville, Cincinnati & Lexington Railway Company, the sole defendant in the cause, is enforced by rule—the ancient chancery mode of enforcing personal judgments—as a personal judgment against a totally different person, who is not even a party to the record. It is not used merely as conclusive evidence against him on the points *therein adjudicated;* but is enforced by rule as if it were in itself a personal judgment against him, thus cutting off *all defenses.*

4. It is not claimed that any statute attempts to authorize this procedure. It is purely the Court's invention in this solitary case. And we submit that the fact that during all the ages in which courts have been administering justice, in equity and at law, such a thing was never done

before, though equal opportunity has offered in countless cases, is very persuasive, if not entirely conclusive, that the great lawyers who have gone before us, who have made the law what it is, who, by their precept and their practice, have fixed and established the principles by which courts act, have never recognized in a proceeding such as this "due process of law," and that *it is not such.*

In Rees vs. Watertown, 19 Wall., 107–122, the Court, in speaking of judicial procedure, and quoting language of the Court of Appeals of New York, said:

> "Due process of law (it is said) undoubtedly means in "the due course of legal proceedings, according to those "rules and forms which have been established for the pro- "tection of private rights."

In Pennoyer vs. Neff, 95 U. S., 714–733, in speaking of due process of law, the Court said:

> "Whatever difficulty may be experienced in giving to "those terms a definition which will embrace every possi- "ble exertion of power affecting private rights, and exclude "such as is forbidden, there can be no doubt of their "meaning when applied to judicial proceedings. *They "then mean a course of legal proceedings according to those "rules and principles which have been established in our "system of jurisprudence for the protection and enforce- "ment of private rights.* To give such proceedings any "validity, there must be a tribunal competent by its con- "stitution—that is, by the law of its creation—to pass "upon the subject matter of the suit; and if that involves "merely a determination of the personal liability of the "defendant, he must be brought within its jurisdiction by "service of process within the State, or his voluntary "appearance."

By the term "voluntary appearance" here used by the Court, it manifestly meant appearance of record by a person who is named as a party to the record; for this is the universally recognized meaning of the term "appearance." The Court doubtless did not imagine that a case would ever arise where a Court would attempt to treat a personal judgment against a particular person, named in the record, as a personal judgment against a different person who was not named in the record.

In the late case of Holden vs. Hardy, 169 U. S., 366–390, this Court, through Mr. Justice Brown, said:

"What shall constitute due process of law was perhaps "as well stated by Mr. Justice Curtis in Murray's Lessees "vs. Hoboken Land Co., 18 Howard, 272–276, as anywhere. "He said: 'The constitution contains no description of "'those processes which it was intended to allow or for-"'bid. It does not even declare what principles are to be "'applied to ascertain whether it be due process. It is "'manifest that it was not left to the legislative power to "'enact any process which might be devised. The article "'is a restraint on the legislative as well as on the execu-"'tive and judicial powers of the government, and can "'not be so construed as to leave Congress free to make "'any process due process of law by its mere will. To "'what principles then are we to resort to ascertain whether "'this process, enacted by Congress is due process? To "'this the answer must be twofold; we must examine the "'Constitution itself to see whether this process be in con-"'flict with any of its provisions. If not found to be so, "'we must look to those settled usages and modes of "'proceeding existing in the common and statute law of "'England, before the immigration of our ancestors, and "'which are shown not to have been unsuited to their "'civil and political condition by having been acted on by "'them after the settlement of this country.'"

Every definition that can be found of "due process of law" involves the idea of some course that has been *established*, it may be by statute or it may be by usage. The very idea of *law* itself involves the conception of "a *rule*, not a transient sudden order from a superior to a particular person; but something permanent, uniform and universal." And it involves the conception of "a rule *prescribed*," that the people who are to be controlled by it may be notified of it. "But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be . . . by writing, printing, or the like, which is the general course taken with all our Acts of Parliament." (1 Blackstone, 44-46). And it is this conception of law that enters into the definitions or descriptions of "*due* process of *law*" which this Court has given, as applied to judicial proceedings, such as "a course of legal proceedings *according to those rules and principles which have been established* in our system of jurisprudence." (Pennoyer vs. Neff, 95 U. S. 733).

With this conception of law we can not believe that in an action against a single defendant, wherein a judgment for payment of money has been entered against him, a rule afterwards issued therein *against another*, who is not a defendant, to show cause why he should not be *considered as a defendant* and be *compelled to pay the judgment*, is "due process of law."

5. It is claimed that due process of law simply involves the essential elements of (1) notice, (2) hearing, (3) judgment; and that if these elements are present it matters not how extraordinary are the proceedings or the result. But this is not true. Possibly the language of some of the earlier cases might give at least color to this contention. But in the late case of Chicago, Burlington, &c. R. R. Co. vs. Chicago, 166 U. S., 234, the Court said: "Nor is the con-

tention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in Court, and was admitted to make defense."

What character of notice did the Louisville & Nashville Railroad Company ever have, and what character of hearing? It never had notice of any claim that *it* was liable to plaintiffs for the amount of these earnings, or that a demand was being made upon *it* for the amount thereof. Counsel insist in effect that it knew plaintiffs wanted to get this money from somebody, and it *ought to* have come into Court and filed an answer and told plaintiffs the exact facts, and made defense, assuming that plaintiffs would have sued it, if they had known the facts. But, in the first place, plaintiffs *did know the facts*, as the response shows; and, in the second place, the law imposes no such obligation on any one. In Pennoyer vs. Neff 95 U. S., 728, the Court quotes with approval the language of Webster vs. Reid, 11 How., that "*no person is required to answer in a suit on whom process has not been served, or whose property has not been attached.*"

After the final judgment had been entered against another, the Louisville & Nashville Railroad Company then had notice that it was claimed to be a party defendant to that judgment, and that it was proceeded against *as such.* And it had a hearing upon *that question*, and *that question only.* But that was not a hearing *upon its liability to plaintiffs;* for if it was a party defendant to that judgment then this question was foreclosed, and it would be given no opportunity to make defense of any kind against the demand of plaintiffs upon it.

But it is said it was giving a hearing upon the question of whether or not the preceding judgment was a judgment against it, and the Court held it was, and that this must be

the end of the matter. *This we utterly deny.* This would be in effect to hold that the judgment of the State Court, to the effect that we have had due process of law, is final and conclusive; which, of course, can not be true, and is not true, as this Court has held.

In Scott vs. McNeal, 154 United States, 34, it appears that Scott had disappeared from home. After an absence of seven years, without his being heard from, some relative applied to the Probate Court, in the State of Washington, in the county where he had resided, to have an administrator appointed, on the ground that he was dead. The Probate Court heard the evidence, held that he was dead, and appointed an administrator. This administrator applied to the Court for authority to sell Scott's real estate, and after formal proceedings, as authorized by statute, the order was entered as sought. The administrator then sold to a certain purchaser, who in turn sold to McNeal. Deeds were passed and the purchase money paid. Scott afterwards returned and brought an action of ejectment against McNeal to recover his land. McNeal defended behind the probate proceedings. He contended that granting letters of administration is "*in the nature of a proceeding in rem;*" that "*public policy* and necessity" required that rights depending upon the death of persons long absent should be settled; that a man is responsible for the natural consequences of his acts; that these probate proceedings were the natural consequences of Scott's acts, and that he was therefore *estopped* to complain of them and take this property back. How familiar all that sounds to one who has read the briefs of the present defendants in error!

On the other hand, Scott contended that the proceedings were not binding upon him, and "that to give effect to the probate proceedings, under the circumstances, would be to deprive him of his property without due process of law." There was a trial. The trial Court held that the probate

Court had jurisdiction to try the very question it did try; that its proceedings were not void; that title passed under them; and it instructed the jury to find for defendant McNeal in the ejectment suit. Scott appealed to the Supreme Court of Washington. It likewise held the proceedings of the probate Court valid, saying, "*The proceeding is substantially in rem*"; and therefore affirmed the judgment in the ejectment suit. (5 Wash. St. 309.) Thus Scott had had a full and fair trial in the State Court on the question of whether or not he was bound by the judgment of the Probate Court; and the State Court had held that it was "substantially *in rem*" and he was bound by it. He then sued out a writ of error from this Court. This Court did not accept the judgment of the State Court as conclusive upon this question, and therefore did not dismiss the writ, or affirm the judgment, but it *reversed* the judgment, and held that the probate proceedings were *not* binding on Scott, and that he *had been* deprived of his property without due process of law.

Just in this connection we may notice counsel's argument that the Court of Appeals in the case at bar simply applied to the Louisville & Nashville Railroad Company "the doctrine of estoppel." Of course this can be said *in every case where a Court enforces or gives effect to a judgment.* The doctrine of "*res adjudicata*" is but a branch of the doctrine of estoppel. Still this Court has a right to inquire, as it did in Scott vs. McNeal, whether or not the *alleged* judgment was *in reality* a judgment against the party complaining.

In the case at bar the Court held that the judgment entered in June, 1894, against the Louisville, Cincinnati & Lexington Railway Company (Abstract 15), was a *valid and enforcible judgment against the Louisville & Nashville Railway Company*, though the latter insists it was not before the Court. It is of that decision we now complain; and it is not conclusive on this Court, as the case just cited shows.

In the case last cited (Scott vs. McNeal) the probate proceedings had been under statute, and the State Court had necessarily passed on the validity and effect of that statute; *but this Court held that it was not bound thereby, when called on to exercise its jurisdiction under the fourteenth amendment of the Constitution of the United States;* and, on this subject, coming to the merits, the Court quoted and reaffirmed the principles announced in the language of Mr. Justice Field, heretofore quoted in Pennoyer vs. Neff, 95 United States, 733, that the words "due process of law" in *judicial* proceedings "mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights," and that if the proceeding involve a determination of the *personal liability* of the defendant, "he must be brought within its jurisdiction *by service of process within the State, or his voluntary appearance;*" and, as heretofore said, the Court manifestly used the expression "appearance" in its legal sense, as courts and lawyers understand it, viz.: An appearance of record entered by a person who has been made a defendant to the cause. It has been the settled law of Kentucky for over seventy years, that even where the *record* purports to show that a person appeared in the cause, this does not make him a party or give the Court jurisdiction over him, if he is not named as a party in the petition or process. (Plummer vs. Crain, 5 T. B. Mon., 378.)

6. In Pennoyer vs. Neff, *supra*, is a consideration of a proposition which has a very strong bearing on one announced by the Court of Appeals in the case at bar, in its opinion of January 14, 1898, and which the Court really makes a fundamental proposition of the case. It said:

> "If the Louisville & Nashville Railroad Company is *a* "*party*, it is so because it has, as assignee of the contract "and owner of the property, *obtained the net earnings and* "*conducted the defense of this suit.*" (Abstract 66.)

Thus the Court recognizes that merely defending the suit could not make the Louisville & Nashville a defendant and give the Court *jurisdiction over it;* but it says that if, in addition to this, it "*obtained the net earnings*"—a fact having no connection at all with the Court proceedings, and one to be determined by extraneous investigation subsequent to the judgment—then it was *a party to the suit* and the Court had *jurisdiction over it.* But if, on investigation it shall turn out, that it *did not obtain the net earnings*, then it is *not a party* to the suit, and the Court *did not have jurisdiction over it.* To our minds this proposition is legally and logically incomprehensible. We can understand how the receipt or non-receipt of such net earnings has a most material bearing on the original question of the liability or non-liability of the company to plaintiffs' demand; but what bearing such question of receipt or non-receipt of net earnings of a railroad can have on the question of whether or not the company is *a party to this suit* is to us absolutely incomprehensible.

As said above, part of the opinion in Pennoyer vs. Neff (95 U. S.) has a decided bearing in this immediate connection. There a non-resident defendant had been proceeded against merely by *constructive service* of process, and a personal judgment for money had been given against him under express authority of a State statute. On this judgment execution issued and was levied on his land in the State. It was sold, and the purchaser put into possession. The party thus proceeded against, then returned and sued the purchaser in ejectment to recover his land. The purchaser, of course, defended under the proceedings mentioned, and argued that they should be held valid, because, while the defendant was not personally before the Court, yet it was manifest from subsequent developments that he had *land* in the State, and that as the statute might have authorized, and in fact did authorize, such land to be seized under attachment *at the beginning* of the action, although on constructive service of process only, there was

no substantial reason why a judgment personal in form might not be entered, and execution issued, and, if land was found to be levied on, then be treated as held under a valid seizure—that this was a mere "question of procedure," and, as the statute authorized it, it should be upheld. This reasoning was quite plausible; and in fact it captured one member of the Court, Mr. Justice Hunt; but all the other members, speaking through Mr. Justice Field, said:

> "But the answer to this position has already been "given in the statement that the jurisdiction of the Court "to inquire into and determine his obligations at all is "only incidental to its jurisdiction over the property. *Its* "*jurisdiction in that respect can not be made to depend upon* "*facts to be ascertained after it has tried the cause and ren-* "*dered the judgment.* If the judgment be previously "void, it will not become valid by the subsequent discov- "ery of property of the defendant, or by his subsequent "acquisition of it. The judgment, if void, when rendered, "will always remain void; *it can not occupy the doubtful* "*position of being valid if property be found, and void if* "*there be none. . . . This doctrine would introduce a* "*new element of uncertainty in judicial proceedings.*" (Page 728.)

So in the case at bar we say that the question of whether or not the Court had jurisdiction in 1894 to render a judgment against the Louisville & Nashville Railroad Company—which, by the way, it did not even purport to do—can not be made to depend upon facts *inquired into four years afterward*, viz., as to whether it did or did not receive certain net earnings of a railroad. If the Court did not intend it to be, and did not make it, a judgment against the Louisville & Nashville Railroad Company, *when it was rendered*, it could not be made such four years afterward upon allegation

or determination of facts not appearing when the judgment was rendered.

We may concede for the purpose of argument, and as not necessary now to be determined, that the conduct of the Louisville and Nashville Railroad Company in connection with this suit prior to the rendition of the judgment of 1894 against the Louisville, Cincinnati and Lexington Railway Company, may have been such that, if it should be sued by plaintiffs, that judgment would be *conclusive evidence against it on certain points adjudicated therein*, as, for example, on the question, so bitterly contested, as to whether the contract covered the earnings on business going both ways or only one way, and on the question of the amount of such earnings. But we do most confidently submit that the Louisville and Nashville Railroad Company *was not in 1894 a party to this cause;* that the Court did not have jurisdiction to render a judgment ordering it to pay money into court; that the Court did not know it was doing so, that it did not purport to do so, and did not in fact do so; and that the judgment of 1894 is *therefore not a judgment against the Louisville and Nashville Railroad Company, and can not be enforced as such.* And with equal confidence we submit that the Court can not presume, conclusively or otherwise, that if the Louisville and Nashville Railroad Company should be sued by plaintiffs on their demand, it would or could have no defense, or no defense other than those points adjudicated in this suit against the Louisville, Cincinnati and Lexington Railway Company. As to whether or not it has such defense or defenses, is, in the language of this Court in Rees vs. Watertown, "*not important. To assume that he has none, and therefore that he is entitled to no day in court, is to assume against him the very point he may wish to contest.*" We, therefore, submit that by the action of the Court (if allowed to stand), in treating the judgment in this cause as a judgment against the Louisville and Nashville Railroad Company, and ordering

it to pay the same, it will be deprived of its property without due process of law.

7. Counsel say the Louisville & Nashville Railroad Company pleaded to the merits as to the original question of its liability to plaintiffs, when it filed its response, and that the Court decided against it on such plea. *This is entirely a mistake.* No such plea was made, nor would such a plea have been received; for the only question sought to be determined on that proceeding was as to whether or not the respondent was a party to the judgment theretofore entered, and hence compellable to pay it—not the question of respondents' original liability to plaintiffs. In support of his statement that a plea to the merits was filed counsel quote two disconnected sentences in the fourth paragraph of the response, and argue that the respondent meant thereby to submit that it was not liable to plaintiffs, because the maker of the lease to the respondent had never consented to the assignment of that lease to the respondent. But such was not the purpose of the allegation referred to, and neither the Circuit Court nor the Court of Appeals treated it as such, though each of these courts delivered a written opinion on the subject of this response. The words quoted are a portion of the fourth paragraph of the response, and that whole paragraph was intended simply to show, as is manifest from reading it, that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser, to show the time and circumstances under which it purchased, and plaintiff's knowledge thereof, and the continued existence of the Louisville, Cincinnati & Lexington Railway Company, by way of suggesting the theory upon which plaintiffs themselves had proceeded in suing the Louisville, Cincinnati & Lexington Railway Company, instead of suing the Louisville & Nashville Railroad Company.

As for the statement in the brief that "the Court held the response on the merits insufficient" it will be seen, as

suggested above, that both the Circuit Court and the Court of Appeals delivered written opinions on the subject of that response in which *each Court purports to state the substance of the response* (Abstract 52 and 68,) *and yet neither Court even alludes, directly or indirectly, to the language which counsel now quote*, and which they say was presented as a plea to the merits. No such question as that now suggested was considered or decided. That the respondent certainly did not *mean* by the response to present any matter going to the merits of the original question of liability is conclusively shown by the preceding language of the response in which it says:

> "If the plaiutiff should be required, in the usual and "orderly way, to institute a suit against this respondent to "hold it liable for plaintiff's alleged claim, this respondent "has, and could and would present good, valid, and sub-"sisting defenses thereto." (Abstract 50.)

These defenses were not presented, however, because the very nature of the proceeding was such as to exclude them, as it was a proceeding, not to determine the question of respondents' original liability to plaintiffs, but to enforce satisfaction of the judgment as if it were a judgment against respondent. And in such a proceeding it was neither requisite nor permissible for respondent to show what defenses it had to the original demand of plaintiffs, if such demand should be made against it. Hence no attempt at such showing was made.

8. It is not necessary to refer to the class of cases involving *lis pendens* purchasers. Whatever rights the Louisville & Nashville Railroad Company acquired in connection with any property referred to in the course of this litigation were, as we have seen, acquired several years prior to the institution of this suit, under a conveyance which was duly

recorded, and of which plaintiffs not only had notice, but *actual knowledge*, at the time this suit was instituted, as the response shows. It is manifest, therefore, that the judgment in this cause could not bind it as a *lis pendens* purchaser. (Dull vs. Blackman, 169 United States, 243–248.)

In this connection, however, it may be well to refer to the case of Iowa Central Railway Co. vs. Iowa, 160 United States, 389, on account of the prominence given to it in the briefs of counsel for defendants in error. It there appeared that a suit was brought at the instance of the people of a certain community, against the Central Iowa Railway Co. to compel obedience by it to an order of the Railway Commissioners of the State requiring it to operate a certain portion of its road. In due time a judgment was entered ordering the operation as prayed for. Thereupon an appeal was taken to the Supreme Court of Iowa. *After the entry of the judgment by the Court of original jurisdiction* requiring the operation of the road, and while the appeal was pending in the Supreme Court, foreclosure proceedings were begun against the Railway Company; and in course of time the mortgage was foreclosed and the property sold, which sale took place just a month before the judgment of affirmance in the Supreme Court of Iowa. All the proceedings in the foreclosure case had taken place after the judgment of the lower Court, and pending the appeal in the Supreme Court. There were one or two conveyances after this judicial sale, and the property soon came into the hands of a corporation evidently organized for the purpose of taking the property, and which was called the Iowa Central Railway Company. It paid no attention to the order for operation of the road; and thereupon the Attorney General filed in the Supreme Court of Iowa a petition for a mandatory injunction against this new corporation as the successor, assignee and grantee of the original defendant, the Central Iowa Railway Company, praying that it might be compelled to obey the mandate and

order of Court. To that petition an answer was filed by the Iowa Central Railway Company, denying in a qualified manner that it was the successor, assignee or grantee of the original defendant, but stating facts which clearly showed that it was such. Thereupon the Attorney General moved for a judgment on the petition and answer on the ground that the answer presented no defense at all. The Supreme Court sustained this motion, delivering a written opinion which is shown in the record in that cause on file in this Court, in which it pointed out that the decree in the original cause expressly ran against "the Central Iowa Railway Company, its officers, agents and servants, its *successors*, *assigns*, *lessees*, and each and every thereof;" and that while there was a qualified denial by the new corporation that it was such successor, assignee or grantee, yet the facts alleged showed beyond a doubt that it was such; and that it was therefore bound by the decree. It is difficult to see how there could be any doubt about the validity of the proceeding in question. The Iowa Central Railway Company, however, sued out a writ of error from this Court, which afterwards dismissed the writ.

The manner of attempting to raise the Federal question, as set forth in this Court's opinion, would seem to have been sufficient of itself to justify the dismissal of the writ. The Court says:

> "Nowhere in the answer or in the amendments to the "answer filed on behalf of the company was it claimed "that the proceeding was violative of the Constitution of "the United States, or assailed any right, title, privilege "or immunity specially set up or claimed under that con- "stitution. Indeed there was no mention of any right "thereunder *until the filing of a brief* for defendant en- "titled 'Defendant's resistance and objection to plaintiff's "motion to enter order prayed for in the petition,' in the

"ninth clause whereof it was claimed that it would be a vio-
"lation of the fourteenth amendment of the Constitution of
"the United States to grant the order prayed for upon the
"motion in question."

The argument of the counsel for plaintiff in error, as appears from his brief on file, was devoted in the first place to an elaborate examination and quotation of various statutory provisions in the Code of Iowa relating to actions of mandamus, which he contended had not been observed, a question with which, of course, this Court had nothing to do. He also argued that it was improper for the Court to sustain a *motion for a judgment* simply on the petition and answer, but that the Attorney-General *ought to have demurred to the answer.* He also insisted that his client was entitled to a jury trial, a question which, of course, has no application to the case at bar. The Court does, in its opinion, speak of what constitutes due process of law, but the view which it took as to what was the real question submitted to it for decision, is clearly stated in the following paragraph near the close of the opinion:

"It is manifest that it was never contemplated by the
"framers of the Constitution that this Court should sit in
"review, as an Appellate Court, of such a question as that
"presented by the record in the case at bar, to-wit:
"*Whether or not the highest Court of a State erred in*
"*holding that it could rightfully determine from the state-*
"*ments in the pleadings, filed by both parties to a contro-*
"*versy pending before it, that the averments of an answer*
"*set forth no defense to the claim of the plaintiff.*"

It seems to us that the State Court in its opinion showed beyond possible doubt from the answer of the defendant that it was the successor and grantee of the original defendant

under a purchase actually made after the original decree was entered, and that it was unquestionably bound by it. And as to the question of practice, as to whether a Court could enter judgment for the plaintiff because the answer presented no defense, without first requiring a demurrer to be filed to the answer, this was so manifestly within the power of the Court, and it was so entirely plain that this presented no federal question, that it seems to us it could have presented no ground for serious dispute.

9. Before concluding, we desire to notice one fact in the record which counsel for defendants in error make prominent in their briefs, but which we have not heretofore noticed, because we could not do so without making a break in the statement or argument of more important matters. During the course of this long litigation there was a change of counsel for the defendant. Former counsel desired their names stricken from the record as counsel. They asked us to accept notice of a motion to that effect. We did so. If we had not done so, it would have been served upon us. It seems—though we did not notice it at the time—that the notice read: "The Louisville & Nashville Railroad Company will take notice that on Monday, April 20, 1891, at the motion hour we will move the Court to strike our names from the record herein as attorneys for said Railroad Company;" and, as there could, of course, be no objection to counsel striking their names from the record, the order was entered, and followed the language of the notice. (Rec. 79-80). We did not notice this; we regarded it as purely a formal matter, a step which counsel had the right to take, and we did not scrutinize it closely. But what does it all amount to? Retiring counsel could not, by such a Parthian dart, shoot into a cause a person not therefore a party, by giving notice to strike their "names from the record as attorneys for such" person, nor by having the Court enter an order to that effect, when the record did not show such person to be a party, nor

these counsel to be its attorneys. *Their names could not be stricken from the record as attorneys for a certain person, when their names did not appear on the record as attorneys for that person.* Of course, the retiring counsel did not mean to inject this stranger into the record, and it is perfectly plain that they did not in fact do so. It was simply a manifest clerical error which corrects itself.

We respectfully ask that the motion to dismiss or affirm be overruled.

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Counsel for Plaintiff in Error.

March 27, 1899.

AUTHORITIES CITED AND REVIEWED.

MOTION TO DISMISS.

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Murray's Lessee vs. Hoboken Land, &c. Co., 18 How., 272, 276.
Davidson vs. New Orleans, 96 U. S., 97, 112.

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Bennett vs. Star Mining Co., 119 Ill., 9.
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1 Blackstone, 44, 46.
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